August 11, 2003

HAND-DELIVERED

The Honorable George A. Finkle
Judicial Dispute Resolution
1411 Fourth Avenue, Suite 200
Seattle, WA 98101

Re: *In re Premera*, OIC Docket No. G 02-45

Dear Judge Finkle:

In accordance with the Commissioner's Tenth Order: Order to Produce Documents for *In Camera* Review, we enclose Premera's Reply to Privilege Briefing by the OIC Staff and the Intervenors. We have served copies of the enclosed brief upon the Office of the Commissioner, the OIC Staff, and the Intervenors. For your convenience, we also enclose copies of the out-of-state authorities discussed in our brief.

Please let us know if you have any questions or would like any further submissions.

Very truly yours,

PRESTON GATES & ELLIS LLP

By Robert B. Mitchell
Robert B. Mitchell

RBM:lkc
Enclosures

cc: Carol Sureau (w/brief only)
John Hamje (w/brief only)
Melanie de Leon (w/brief only)
Michael Madden (w/brief only)
Jeffrey Coopersmith (w/brief only)
Richard Spoonemore (w/brief only)
Amy McCullough (w/brief only)

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application regarding the Conversion and Acquisition of Control of Premera Blue Cross and its Affiliates	No. G 02-45 PREMERA'S REPLY TO PRIVILEGE BRIEFING BY THE OIC STAFF AND THE INTERVENORS

I. Introduction

The OIC Staff's response brief focuses upon the extraordinary assertion that Premera's Form A Statement, *ipso facto*, waived attorney-client privilege and work product protection in this proceeding. Such an assertion directly contradicts the OIC Staff's prior public position. More importantly, the OIC Staff's assertion is contrary to Washington law and to every reported case in the country. The OIC Staff's attack upon the very purpose of *in camera* review must be rejected.

The remaining arguments advanced by the OIC Staff and by the Intervenors on the scope of privilege and work-product protection are overbroad, inapplicable, or both. The Special Master should rule that the documents on Premera's privilege logs are protected.

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II. Argument

A. Premera Has Not Waived Privilege by Filing a Form A Statement.

The OIC Staff's brief advances a legal proposition that cannot be sustained. Filing a Form A Statement with the OIC is not an implied waiver of privilege and work product protection. This should be evident from the authority cited in the Commissioner's Tenth Order. The Administrative Procedure Act requires the Commissioner to recognize and apply established privileges. RCW 34.05.452(1). That requirement would be rendered meaningless if, as the OIC Staff now claims, privilege is obliterated by the very act of submitting an application for approval by the Commissioner.

The OIC Staff's brief flatly contradicts the OIC Staff's prior position. Until August 4, 2003, the OIC Staff consistently represented that it intended to respect privilege in this proceeding:

> But what we're doing with the privilege log, we're going to sit down and go through that and work through that and hopefully come to a resolution. Clearly, privilege is something that everyone must recognize, and if an item is truly privileged, then we must leave it alone.

Comments of J. Hamje, March 24, 2003 Prehearing Status Conference Hearing Transcript, pp. 24-25 (Appendix A).[1] In his Tenth Order, the Commissioner directed an *in camera* review to address any concerns by the OIC Staff and consultants about the legitimacy of Premera's privilege claims. The very considerable effort required for *in camera* review would have been wholly unnecessary if the OIC Staff's waiver claim had been raised

[1] In the Second Joint Status Report (March 21, 2003), similarly, the OIC Staff said that it and the States' Consultants "have initiated a review of the revised [privilege] log to determine the materiality of the withheld documents and consider the validity of Premera's claims of privilege." Id. at 2. The OIC Staff also suggested that Premera consider a voluntary waiver of privilege, stating that a "waiver of privilege here would likely shorten the time frame for the States' Consultants [sic] review of the proposed transaction." Id. at 3 n.1. At no point did the OIC Staff suggest that a waiver had already occurred. On the contrary, as recently as June 24, 2003, the OIC Staff advised the Special Master that it intended to respect Premera's attorney-client privilege in this proceeding.

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earlier and if it had any force. The OIC Staff's claim is, however, as meritless as it is untimely.

Every Washington case cited by the OIC Staff on implicit waiver involves either attorney malpractice or the "advice of counsel" defense—cases in which a litigant affirmatively puts an attorney's advice at issue as part of the litigant's claim or defense. See Stern v. Daniel, 47 Wn. 96 (1907) (malpractice claim waives privilege so that attorney may have defense to action); Pappas v. Holloway, 114 Wn. 2d 198 (1990) (malpractice claim provided implicit waiver with respect to attorney who took over representation); Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975) (advice of counsel defense). The OIC Staff appears to take the position that an applicant for regulatory approval puts at issue its attorney's advice, just as if the company had sued its attorney for malpractice. Such a contention has no merit whatever, and the Washington cases cited by the OIC Staff are inapplicable.

The OIC Staff draws comfort from the fact that another agency—the California Public Utilities Commission—saw fit to make a similar implied waiver argument. That may constitute precedent of a sort, but far more compelling is the California Supreme Court's unanimous rejection of the Commission's argument. Southern Cal. Gas Co. v. Pub. Util. Comm'n, 784 P.2d 1373 (Cal 1990) ("Southern Gas"). In that case, a public utility initiated proceedings before the Commission to recover certain fuel costs. During the proceeding, the Commission sought disclosure of privileged memos written by the attorneys for the company. The Commission asserted that the company had waived privilege by placing the legal advice it received at issue. The court flatly rejected that assertion, making it clear that agencies like the OIC are required to recognize the attorney-client privilege and work product doctrine in proceedings such as this one.

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In Southern Gas, the court first examined whether the attorney-client privilege applies to Commission proceedings. The court acknowledged that the Commission possesses broad examination authority under its governing statutes. See Cal. Pub. Util. Code § 313, Cal. Pub. Util. Code § 314(a), and Cal. Pub. Util. Code § 582. See also Cal. Const. Art. XII, § 6 (empowering the Commission to examine records, take testimony, and punish for contempt). Despite this authority, which is at least as broad as that possessed by the OIC, the court rejected the contention that the Commission could compel the production of privileged material:

> Although the above statutes grant the commission broad investigatory powers, we conclude in the absence of language creating a specific exemption to the privilege, the Legislature enacted these provisions under the assumption that the attorney-client privilege applied.

784 P.2d at 1377 n. 10.

Next, the court took up the Commission's implied waiver argument. The Commission had determined that the utility's filing put the advice of its counsel at issue, because the utility had the burden of proving that its decision to buy out a contract was reasonable. Id. at 1377 ("It is not SoCalGas's application alone that waives the privilege here; it is the fact that we see no basis for finding SoCalGas's choice of buyout reasonable, other than advice of counsel.") (quoting agency decision). The court unequivocally rejected that argument, noting:

> SoCalGas has done nothing in the present proceedings to place in issue its privileged communications. Nowhere in its CAM application or in the proceedings before the commission does SoCalGas state that it intends to rely on its attorneys' advice or state of mind to demonstrate that it acted reasonably when it bought out the Getty contract ... Because its attorneys' advice or state of mind is not in issue, it has not impliedly waived its attorney-client privilege.

Id. at 1379.

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Finally, the Southern Gas court rejected the argument that privilege was implicitly waived because the proceeding involved an issue upon which the company had sought legal advice. Because "there is no waiver of the attorney-client privilege where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the matter," id. at 1378, the Commission was not entitled to the privileged material. As the court explained:

> If we were to uphold the commission's ruling, it would have the right to demand privileged information from a utility whenever a CAM application or any other application to recover costs involved a legal issue, since legal advice might be one source of information the utility considered. The commission's approach would drastically impinge on a utility's efforts to obtain adequate legal advice because a utility would be much less likely to divulge all pertinent information to its attorneys ... Expanding the implied wavier of the attorney-client privilege in the manner suggested by the commission's holding would create an intolerable burden upon the privilege ...

Id. at 1381-82 (internal quotations omitted). See also Transcontinental Gas Pipe Line Corp., 38 F.E.R.C. ¶ 63,042 at *4 (1987) (company did not implicitly waive privilege for attorney advice by rate filing; "while this information may be relevant, it is not vital to the development of ... [the parties'] respective cases ... [the company's] attorneys' advice is not the sole source of legal evaluation of these contracts.").

Southern Gas simply does not support an argument that Premera's Form A filing waived privilege. The case specifically rejects the argument that an application for agency approval waives privilege, and on that point it is indistinguishable from the present matter. Like the company in Southern Gas, Premera has not put its attorneys' advice at issue in this Form A proceeding. Nor is evaluation of that advice vital to a fair adjudication of Premera's Form A Statement. Even if the subjective impressions of Premera's management were at issue under the applicable Form A review standards,

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which they are not,[2] this would not place in issue the state of mind of the company's attorneys or their advice. See Southern Gas, 784 P.2d at 1378-79 (discussing cases). Likewise, the OIC Staff is not entitled to review Premera's privileged materials merely because they are relevant to issues raised in this proceeding. Furthermore, the allocation of the burden of proof is a red herring: the same privilege rules apply to plaintiffs as to defendants. "If a lawyer could not promise to maintain the confidentiality of his client's secrets, the only advice he or she could provide would be, 'Don't talk to me.'" Id. at 1375-76 (quoting Welfare Rights Organization v. Crison, 33 Cal.3d 766, 771 n.3 (1983)).

Southern Gas followed a long line of cases rejecting the contention that privilege does not apply within an agency proceeding. No court has upheld an attempt by a regulatory agency to override attorney-client privilege and work product protection, whether based on the scope of agency examination authority or an implied waiver theory. Every reported decision, as far as Premera has been able to determine, holds squarely to the contrary. See, e.g., United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915) (ICC's statutory authority to examine all records of regulated carriers did not extend to privileged material); Civil Aeronautics Board v. Air Transport Ass'n of America, 201 F. Supp. 318 (D.D.C. 1961) (CAB investigation authority did not extend to privileged material: "In order to abrogate it [privilege] in whole or in part as to any proceeding whatsoever, affirmative legislative action would be required that is free from ambiguity.") (discussed with approval in Southern Gas, 784 P.2d at 1376-77).

[2] The OIC Staff argues that the statutory criteria "contemplate the necessity of looking beyond the objective manifestations of the Proposal but [sic] to the subjective perceptions and motivation of management . . . ." Staff Brief at 3. This argument is specious. The criteria set forth in RCW 48.31B.015(4)(a) and RCW 48.31C.030(5)(a) are straightforward and objective. Premera's proposal is either in the public interest or it is not. What management may have thought about this question is irrelevant.

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These cases confirm that a party to an agency proceeding retains privilege and work product protections. See Upjohn Co. v. United States, 449 U.S. 383, 390 (1981) (IRS summons power is limited by privilege and work-product); United States v. Euge, 444 U.S. 707, 712 (1980) (IRS authority to compel testimonial or evidentiary disclosure limited "principally by relevance and privilege"); SEC v. Harrison, 80 F. Supp. 226, 230 (D.D.C. 1948) (SEC's authority is subject to attorney-client privilege and work product), *appeal dismissed*, 184 F.2d 691 (D.C. Cir. 1950), *vacated*, 340 U.S. 908 (1951); SEC v. First Security Bank of Utah, 447 F.2d 166, 167 (10th Cir. 1971) (privilege applies); SEC v. Kingsley, 510 F. Supp. 561, 564 (D.D.C. 1981) (attorney-client privilege may be asserted); EEOC v. Guess?, Inc., 176 F. Supp. 2d 416 (E.D. Pa. 2001) (target of EEOC investigation can interpose privilege and work-product objections to demand for documents); Southern Bell Tel. and Tel. Co. v. Deason, 632 So.2d 1377 (Fla. 1994) (regulating agency cannot exercise its authority at the expense of destroying the corporate attorney-client privilege or work product protection).

The OIC Staff's implied waiver argument is wholly devoid of merit. It should not be given any weight in this proceeding.

B. Premera's Documents Are Protected.

The other arguments advanced by the OIC Staff and by the Intervenors[3] do not contradict the key points made in Premera's opening brief. The OIC Staff does not dispute that third-party consultants may come within the scope of attorney-client privilege; that work product protection applies to materials prepared in anticipation of this

[3] The Commissioner's Tenth Order allowed Premera to submit briefing related to its privilege claims and provided that "responsive briefing, if any, may be served and filed by the OIC Staff." Tenth Order, ¶ 2. The Commissioner's ruling followed the Special Master's recommendation on this issue. Special Master's Scheduling Recommendation (July 7, 2003) p. 3. Despite the fact that briefing from the Intervenors was not invited by the Special Master or the Commissioner, Premera will address those issues the Intervenors raise that merit a response.

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contested legal proceeding; or that work product protection extends to materials prepared by attorneys, client representatives, and consultants. As demonstrated by its briefing, its *in camera* submissions, and the documents themselves, Premera's withheld materials are protected by attorney-client privilege, by the work-product doctrine, or by both.

1. Portions of Corporate Minutes Reflecting Attorney-Client Communications are Protected by Privilege.

The Intervenors' argument about corporate minutes, Int. Brief at 5-6, is entirely misplaced. Privileged communications remain protected within corporate meeting minutes, as the authority upon which the Intervenors rely plainly demonstrates. In Great Plains Mut. Ins. Co. v. Mutual Reinsurance Bureau, for example, the court denied a motion to compel production, holding that minutes of a corporation's board of directors meetings that included conversations with the company's attorney (who also sat on the board) were protected from discovery by the attorney-client privilege and/or the work product doctrine. 150 F.R.D. 193 (D. Kan. 1993). The court explained that "[w]hile it is possible that the advice ... could conceivably affect ...[the company's] success (or failure) ... this possibility does not convert the legal advice rendered by its attorney into discoverable 'business advice' – such a construction of the attorney-client privilege would eviscerate the privilege and essentially render it a nullity ..." Id. at 197. See also In re Ford Motor Co., 110 F.3d 954, 966 (3d Cir. 1997) (minutes of a meeting were privileged even though the meeting was held primarily because of business considerations).

Where Premera's corporate documents (particularly meeting minutes) could be redacted to withhold attorney-client communications and legal analysis but provide the business portions, Premera has produced the documents in redacted form. This approach was specifically approved by Burroughs Wellcome Co. v. Barr Labs., Inc., 143 F.R.D. 611, 618 (E.D. N. Car. 1992) (finding handful of meeting minutes wholly unprotected but

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allowing for redaction of privileged communications from majority of minutes) (discussed in Int. Brief at 6). If a document is not susceptible to redaction, it should be wholly protected.

2. Premera's Consultants Come Within the Scope of Privilege and Work Product Protection.

The Intervenors challenge the inclusion of consultants within the zone of privilege, arguing that the consultant must be "***essential*** for the attorney to understand the [client's] communication." Int. Brief at 4 (emphasis in the original). The Intervenors' argument relies on an overly narrow reading of the case law. See United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (privilege is not broken "by the presence of the accountant [, who] is necessary, or at *least highly useful*, for the effective consultation between the client and the lawyer which the privilege is designed to permit.") (emphasis added). The analysis adopted in Kovel has been applied to protect privilege in circumstances similar to those presented here. See, e.g., In re Bieter Co., 16 F.3d 929, 939-40 (8th Cir. 1994); In re Copper Market Antitrust Litig., 200 F.R.D. 213, 217-18 (S.D.N.Y. 2001); McCaugherty v. Siffermann, 132 F.R.D. 234, 239 (N.D. Cal. 1990). As noted in Premera's Opening Brief, Premera's attorneys needed to communicate with retained consultants in order to navigate a complex regulatory process and to provide fully informed legal advice to their client. Under such circumstances, consultants are within the zone of privilege.

Although the Intervenors quote extensively from United States v. ChevronTexaco Corp. in support of their "zone of privilege" argument, they fail to discuss the rulings in that case concerning protection for consultant-generated work product. 241 F. Supp. 2d 1065, 1087-1090 (N.D. Cal. 2002). The work product doctrine protects materials prepared not only "by or for" a party, but also work product prepared by or for that party's attorneys, consultants, or agents. CR 26(b)(4). The Intervenors' argument that consultant

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activities, such as tax analysis, are not protected as work product because they are "all categories of business activities that were required even if there had been no expectation of litigation," Int. Brief at 6, cannot be squared with ChevronTexaco's holding that consultant materials prepared with an eye to agency challenge are covered by the work-product doctrine.

In ChevronTexaco, the company resisted producing its consultants' transaction work papers in the context of a subsequent IRS challenge. The court held that transaction planning by the company's outside consultants was protected work product because the client anticipated an agency challenge. This was so even though, under the facts presented, the court could not find that the consultants were within the scope of privilege. 241 F. Supp. 2d at 1090 ("Price Waterhouse acted as an agent of Chevron, acting in anticipation of litigation, when preparing its extensive legal analyses of the challenged transaction."). As ChevronTexaco explains, the protection of work product obtains during the planning phase of a transaction where litigation is anticipated, for good reason:

> An attorney's (or a party's) reasoning or research (factual or legal) about anticipated litigation should not be discoverable simply because the work also had to be undertaken to facilitate or consider a business transaction ... [R]efusing to protect litigation analyses prepared prior to implementing a transaction will discourage parties from making every effort to structure their deals in unobjectionable ways ...

Id. at 1982.

It is evident from ChevronTexaco and from Washington case law that documents prepared by Premera's consultants enjoy work product protection in addition to privilege protection. See Linstrom v. Ladenburg, 110 Wn. App. 133, 143 n.11 (2002) ("the ability to protect work product normally extends to both clients and attorneys") (citations and quotations omitted); Heidebrink v. Moriwaki, 104 Wn.2d 392, 396 (1985). Inasmuch as "the work product doctrine can reach documents prepared 'because of litigation' even if

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they were prepared in connection with a business transaction or also served a business purpose," Premera's withheld materials are protected from disclosure. ChevronTexaco, 241 F. Supp. 2d at 1082.

3. Premera's Protected Materials Contain Privileged Legal Advice and Were Not Created in the Regular Course of Business.

The Intervenors make two other points: first, that privilege does not apply to business rather than legal advice; and second, that work product protection does not apply to materials produced in the regular course of business without anticipation of litigation. Neither point applies here. Premera's withheld privileged communications reflect legal advice. Its protected material, produced in preparation for the agency hearing and subsequent litigation, was not created in the ordinary course of business.

This conclusion is in no way undermined by the corporate process within which the protected material was created. Contrary to the OIC Staff's argument, work product protection does not turn on whether an analysis of the proposed conversion was prepared and reviewed using structures or protocols common to business decisions (e.g., a steering committee or specialized consultants). Cf. Staff Brief at 8. The appropriate inquiry is whether the materials were prepared in anticipation of litigation. CR 26(b)(4). As the ChevronTexaco court explained, planning-phase materials that are protected as work product include materials that analyze aspects of the transaction in light of potential future agency challenges:

> Documents that were prepared because of anticipated litigation might include, for example, discussions about alternative ways to structure the transaction where these alternatives reflect thinking about the IRS' expected reaction to and treatment of the deal.

241 F. Supp. 2d at 1084. Despite the Intervenors' implications, Premera has not withheld business materials from production to the OIC. The materials it has withheld were created in anticipation of litigation and are therefore protected from disclosure.

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C. The OIC Staff and Consultants Have Not Demonstrated Substantial Need or Inability to Obtain the Substantial Equivalent of Premera's Work Product.

The OIC Staff argues that, even if Premera's materials are protected, they should be disclosed because the OIC Staff and the Consultants have need of Premera's legal analysis in order to evaluate the Form A Statement. Staff Brief at 5, 8-9. This argument applies only to materials shielded exclusively by work product, because if documents fall under the attorney-client privilege, they are not discoverable no matter how relevant they may be and irrespective of the degree of need shown. Henson v. Wyeth Labs., Inc., 118 F.R.D. 584, 587 (1987). In any event, the OIC Staff has not made the showing required for work product disclosure—namely, substantial need plus an inability to obtain the substantial equivalent of Premera's work product by other means.

The work product rule allows for disclosure under very limited circumstances, not present here. The rule allows a party to obtain the work product of another party

> only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

CR 26(b)(4). The OIC Staff asserts that Premera's protected materials are vital to the statutory criteria for evaluation of its proposal—specifically, whether the proposal is in the public interest and whether Premera's business plan is reasonable. Staff Brief at 5-6. Even if the premise of the assertion were correct, which it is not, this is insufficient.

To demonstrate a "substantial need," the sought-after materials must be "essential" to the other party's case; the mere desire to obtain additional evidence is insufficient to justify disclosure of work product. Fletcher v. Union Pac. R.R. Co., 194 F.R.D. 666, 671 (S.D. Cal. 2000). The OIC Staff has not demonstrated a substantial need for Premera's protected work product for the preparation of its case. Further, the OIC Staff has not made any showing that it and its consultants are unable without undue hardship to obtain

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the substantial equivalent of the materials by other means. In fact, the OIC Staff can generate its own legal advice and opinions. See Transcontinental Gas Pipe Line Corp., 38 F.E.R.C.¶ 63,042 at *4 ("while ... [the attorney's legal advice] may be relevant, it is not vital to the development of ... [the parties'] respective cases ... counsel can review the contracts themselves and determine what legal defenses were available ... [the company's] attorneys' advice is not the sole source of legal evaluation of these contracts.").

At base, the OIC Staff wants to review Premera's legal work product in order to ascertain "the subjective perceptions and motivation" of the company. Staff Brief at 5. Such voyeurism, in addition to ignoring the objective standards for evaluating Premera's Form A Statement, cannot be squared with the absolute protection given to mental impressions by the work product doctrine. "The mental impressions of the attorney and other representatives of a party are absolutely protected, unless their mental impressions are directly at issue." Limstrom v. Ladenburg, 136 Wn.2d 595, 611 (1998); see also CR 26(b)(4) ("In ordering discovery of [work product] when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."). The mental impressions and case preparation of Premera, its counsel, and its consultants are not at issue in this proceeding. Even if they were, such mental impressions are absolutely protected, as are the documents that reflect them.

III. Conclusion

Premera urges the Special Master to reject the OIC Staff's frivolous argument on implicit waiver and its unfounded request for discovery of Premera's work product. Premera's privileged and work-product materials should be protected.

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DATED this 11th day of August, 2003.

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APPENDIX A

BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF WASHINGTON

In the Matter of the Application Regarding the Conversion and Acquisition of Control of Premera Blue Cross and Its Affiliates.	)))))	Docket No. G02-45

PREHEARING STATUS CONFERENCE

March 24, 2003
Tumwater, Washington

COPY

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effectively for the second time; and that is the issue of setting some dates, to what extent, from the standpoint of when information is to be filed or, as was suggested, offering explanation as to why there would be problems with setting a specific date or limitations thereof.

To what extent would the intervenors have concerns on that particular point?

MS. HAMBURGER: Our concerns are just that, before the -- before dates are set, that the OIC experts have access to all the information that they feel they need in order to set out the time frame and make sure that they're able to give as definitive determinations as they can when they issue their report.

COMMISSIONER KREIDLER: And OIC? How would they respond to setting dates?

MR. HAMJE: Much the same way, except that I would want to emphasize I think that we've made tremendous progress in these last -- even just since the last status conference. We have engaged in telephone conference calls with the consultants, representatives of all the consultants, twice a week, except for the one week where we also met face to face, with some telephonic participation, in Seattle on March, I think it was, 14th.

We are getting to a point where I think that we're going to be in a position, hopefully soon, to be able to make some

definitive statement and representation to you.

But we've got to keep in mind a couple of things in this process. Although this is a unique process as far as Washington is concerned, it is really -- and as I've emphasized from the very beginning, it is still basically a Form A filing, about which we have tremendous experience and procedures that have been long-established. And those procedures have always been kind of a give-and-take kind of relationship between an applicant and the OIC; we ask questions and the applicant provides answers or responses, and we work together to a point where the particular application can be determined.

And if we -- one of the concerns I have in this process is that, if we go ahead and stop any further questioning, that is going to cripple us, even to the point where, if there is a completion of the data-production phase and the process for drafting reports has begun, there still are going to be questions that are going to come up. And we're still going to have to have the kind of give-and-take flexibility that we have usually enjoyed or normally enjoyed in this process. And so we're going to want to continue that.

But what we're doing with the privilege log, we're going to sit down and go through that and work through that and hopefully come to a resolution. Clearly, privilege is something that everyone must recognize, and if an item is

truly privileged, then we must leave it alone.

But there are issues. And I do want to make it clear that one of the issues that, Commissioner, you're going to be considering is one that you mentioned in your Fourth Order, which is whether the future business plans of Premera are unfair or unreasonable to subscribers and not in the public interest. And when you're dealing with that issue, one of important questions that you have to approach is whether or not there is an adequate business case that's been made for this particular transaction, whether there are any conflicts of interest, and if there are conflicts of interest, that they've all been properly disclosed to the board.

And in some respects, we have to be very careful as we proceed through this process, to where we see those kinds of items, we've got to flag them. And that, I think, is to a great extent some the concerns that these experts who we have retained are seeing.

For instance, in other conversions that they've worked on, they may have found evidence, you know, and that's why the questions that they're asking are designed to elicit evidence such as this. And when it comes back that, "Well, no, we have not put together a compensation plan for post-conversion," that raises some warning flags and some questions about that. Because that's a very important issue in terms of conflict of interest.

COMMISSIONER KREIDLER: Couldn't you, though -- within the guidelines of the issues that you're raising, couldn't you still specify where effectively it is complete, and then you're moving on and identifying defined areas?

MR. HAMJE: I believe -- Commissioner, I think that ultimately, exactly that's what's going to happen. If there are areas where Premera does not have records, there are areas where the records they do have are privileged, then each of the reports are going to have to address those omissions. And again, whether it's justifiable or not, that's not what I'm addressing at this point in time. It's just that that's what the report's going to address. And it may very well be a problem; it may not be a problem.

But it is a concern, and that's why I believe you're seeing this -- you see in these letters and these tables that the consultants have submitted what their concerns are and why they believe there are certain items critical to their draft reports, and others are very high in importance as well.

COMMISSIONER KREIDLER: Mr. Mitchell?

MR. MITCHELL: Commissioner Kreidler, I want to agree vehemently with Mr. Hamje on one point, which is that there is value in the back-and-forth that we've had in the last two weeks. And as he said, if we were to stop any further questioning at this point, that would be a bad thing.

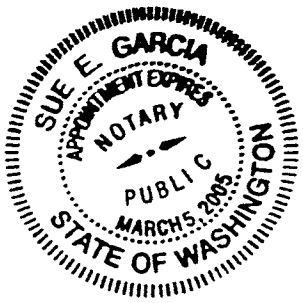
C E R T I F I C A T E

I, SUE E. GARCIA, a duly authorized Court Reporter and Notary Public in and for the State of Washington, residing at Tacoma, do hereby certify:

That the foregoing proceedings were taken before me on the 24th of March, 2003, and thereafter transcribed by me by means of computer-aided transcription, that the transcript is a full, true, and complete transcript of said proceedings;

That I am not a relative, employee, attorney, or counsel of any party to this action or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

IN WITNESS HEREOF, I have hereunto set my hand and affixed my official seal this March 27, 2003.



SUE E. GARCIA, CCR, RPR
WA Lic. No. 2781

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application Regarding the Conversion and Acquisition of Control of Premera Blue Cross and its Affiliates	No. G02-45 CERTIFICATE OF SERVICE

I, Dennis M Tessier, certify that I served a copy of the following document(s):

1. **LETTER FROM ROBERT MITCHELL TO JUDGE FINKLE DATED AUGUST 11, 2003**

2. **PREMERA'S REPLY TO PRIVILEGE BRIEFING BY THE OIC STAFF AND THE INTERVENERS**

3. **CERTIFICATE OF SERVICE**

on all parties or their lead counsel of record on the date below as follows:

Service To:	**Service Perfected By:**
Carol Sureau Deputy Insurance Commissioner Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 P.O. Box 40255 Olympia, WA 98504-0255 (Original & 4 plus 1 Electronic by E-Mail)	[X] By United States Mail [ ] By Overnight Delivery [ ] By Legal Messenger Service [ ] By Hand Delivery [X] By Facsimile [X] By E-Mail

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this Monday, August 11, 2003.

Dennis M. Tessier

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